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INTRODUCTION

THE requirement set forth by the Fourth Amendment that police must obtain a warrant prior to a search and seizure has been diminished by judicially created exceptions.[2] One such exception is the exigent circumstances doctrine.[3] This exception allows police to enter a home without a warrant based on a compelling need to immediately conduct a search.[4] Until 2011, the federal circuits were split on how to apply this warrantless entry doctrine, each employing various tests and standards.[5] In *King v. Commonwealth*, the Supreme Court of Kentucky attempted to

1 JD expected May 2013, University of Kentucky College of Law; BA in Psychology, University of Louisville, 2010.

2 *Compare* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."), *and* Brigham City v. Stewart, 547 U.S. 398, 403 (2006) ("Under the Fourth Amendment, searches and seizures inside a home without a warrant are presumptively unreasonable."), *with* Mincey v. Arizona, 437 U.S. 385 (1978) (showing that an exception to the warrant requirement of the Fourth Amendment is an exigent circumstance), *and* United States v. Simmons, 661 F.3d 151 (2d Cir. 2011) (When "the exigencies of [a] situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable" no warrant is needed to enter the home).

3 Payton v. New York, 445 U.S. 573, 586–88 (1980).

4 *See, e.g.*, Groh v. Ramirez, 540 U.S. 551, 559 (2004); United States v. Bank, 540 U.S. 31, 40 (2003); Illinois v. McArthur, 531 U.S. 326, 331–32 (2001); Minnesota v. Olsen, 495 U.S. 91, 100 (1990).

5 *See Simmons*, 661 F.3d 151 (2d Cir. 2011) (holding that an objective standard should be employed in measuring exigent circumstances and police action); United States v. Mowatt, 513 F.3d 395 (4th Cir. 2008) (using a reasonably foreseeable, subjective approach); United States v. Coles, 437 F.3d 361, 367–70 (3d Cir. 2006) (focusing on the reasonableness of police actions to determine if exigent circumstances exist); United States v. Williams, 354 F.3d 497, 504–05 (6th Cir. 2003) (holding that police cannot create exigent circumstances even when they have probable cause to believe that a crime has been committed); Ewolski v. City of Brunswick, 287 F.3d 492, 504 (6th Cir. 2002) (holding that a search is invalid if police deliberately create the exigency to avoid the warrant requirement).

carve out an exception to the exigent circumstances doctrine, which set forth the requirement that police officers could not create the exigency and then rely on it to enter without first obtaining a warrant.[6] In response to a perceived growing tension among the circuits, the United States Supreme Court reviewed *King v. Commonwealth* (*King I*) in *Kentucky v. King*[7] (*King II*) to instruct courts as to how to properly evaluate police–created exigent circumstances.

In *King II*, the Supreme Court created a new test for evaluating police–created exigent circumstances, snuffed out at least five different tests among federal and state courts, overruled a unanimous Kentucky Supreme Court decision, and loosened the tight grip the Court had employed on police–created exigencies in the past.[8] The result was a weakening of the Fourth Amendment, allowing bad–faith intent for warrantless entries, causing confusion among the circuits, and giving an unprecedented amount of discretion to police officers.[9] This new test, satisfying only a minority of the prevailing views of the various exigency doctrines, has been left to the federal district and state courts to define and apply because the United States Supreme Court laid down what the test should be, but then remanded the case back to Kentucky without applying it. Like an incomplete thought, the Supreme Court told lower courts that exigent circumstances must be objectively gauged but provided no tools or instructions with which to analyze these issues. Thus, *King II* stopped short of truly solving the dilemma in this doctrine. Ultimately, what is *not* known is how this test truly affects warrantless entry based on the exigent circumstance exception while *what is known* is that decades of case law has been abrogated, leaving the courts to flounder as they attempt to grasp this new perspective on police–created exigencies. Perhaps even more damaging than the lack of direction given by the Supreme Court in its decision is the reality that the Fourth Amendment safeguard against warrantless entries based on exigent

6 King v. Commonwealth (*King I*), 302 S.W.3d 649, 655 (Ky. 2010).

7 Kentucky v. King (*King II*), 131 S. Ct. 1849 (2011).

8 *See, e.g.*, Welsh v. Wisconsin, 466 U.S. 740, 753 (1984) ("[N]o exigency is created simply because there is probable cause to believe that a serious crime has been committed."); Payton v. New York, 445 U.S. 573, 587–88 (1980) ("[A]bsent exigent circumstances, a warrantless [search for evidence] is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within."); Taylor v. United States, 286 U.S. 1, 6 (1932) ("Prohibition officers may rely on a distinctive odor [of whiskey] as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees . . . against unreasonable search.").

9 *See* Arizona v. Gant, 556 U.S. 332, 342 (2009) (quoting McDonald v. United States, 335 U.S. 451, 455–56 (1948)) (stating that privacy and security in one's home, the "central concern underlying the Fourth Amendment," is "too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals").

circumstances was weakened as a result of *King II*,[10] and it appears that courts are applying this new test in varying degrees.

This note will explain that the objective standard within the police–created exigency exception to the doctrine of exigent circumstances created in *King II*, supported only by one circuit,[11] is contrary to the fundamental notion that searches are unconstitutional under the Fourth Amendment barring very limited exceptions and is currently being—and will continue to be—misconstrued among the circuits based on the regional histories of this doctrine.[12] *King II* was supposed to resolve a split among the courts, but rather, as this note will highlight, it shifted the doctrinal safeguards to grant police more discretion and created a rift in evaluating police–created exigencies, forcing courts to choose between core underlying Fourth Amendment principles and a surprising Supreme Court decision.[13]

This note is divided into seven parts. Part I outlines the power behind the Fourth Amendment with a particular emphasis on the various exceptions to the warrant requirement that courts have developed through decades of meticulous jurisprudence. This will include a historical review of the doctrinal components of exigent circumstances that existed up to *King II*. Part II focuses on *King I*, highlighting the Kentucky Supreme Court's unanimous decision regarding the application of the exigent circumstances doctrine, providing the factual background to the suppression issues at the trial level, and comparing the Kentucky Appeals Court decision with that of the Kentucky Supreme Court. This will serve to place the legal issue that was "resolved" by the United States Supreme Court in its proper context. Part III will discuss and explain the circuit split as it existed prior to *King II*, foreshadow the various ways in which the circuits will begin applying the tempest holding of *King II*, and enumerate the authority and rationale employed in the use of these doctrinal tests. Part IV will explain Kentucky's unanimous decision in *King I*, which was overturned in *King II*.

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10 *See King II*, 131 S. Ct. at 1864 (Ginsburg, J., dissenting).

11 *See* United States v. MacDonald, 916 F.2d 766, 772 (2d Cir. 1990); *King II*, 302 S.W.3d 649, 656 (Ky. 2010) ("The Second Circuit appears to give the most deference to law enforcement . . . .").

12 This is not the first time that the power of the Fourth Amendment has been questioned and changed abruptly by the Supreme Court. *See generally* Alfredo Garcia, *Toward an Integrated Vision of Criminal Procedural Rights: A Counter to Judicial and Academic Nihilism*, 77 MARQ. L. REV. 1, 2 (1993) (citing Bruce A. Green, *"Power, Not Reason": Justice Marshall's Valedictory and the Fourth Amendment in the Supreme Court's 1990 Term*, 70 N.C. L. REV. 373 (1992)) (pointing out that the Supreme Court has "employed interpretive principle, policy, and precedent in an inconsistent fashion to yield a restrictive construction of the Fourth Amendment in every case").

13 *See* Stanford v. Texas, 379 U.S. 476, 481 (1965) (stating that the Fourth Amendment is designed to protect against "the worst instrument of arbitrary power, the most destructive of [] liberty, and the fundamental principles of law . . . ."); *see also* Garcia, *supra* note 12, at 8 (noting that the Fourth Amendment is a basic freedom and that misuse of warrants is what sparked the American Revolution).

Part V will address the route by which *King I* became *King II* through an analysis of the petition for certiorari, amicus brief, and respondent filings. Part VI will address the Supreme Court's reaction to *King I* in *King II*.

This note concludes with Part VII, an analysis that meshes the doctrinal components of the test created by the Supreme Court in *King II* with the tests used in the various circuits with the goal of finding what the Supreme Court may have intrinsically been relying on when it created this objectively–based test. Ultimately, this note cautions against the use of a purely objective standard and advocates that the proper way to interpret this standard, as reflected in recent federal circuit and district decisions, is a measure that is partially subjective while retaining a proper level of objective inquiry. The analysis discusses the effects of the objective doctrine, pointing out potential discretionary issues substantiated by Justice Ginsburg's dissent. At the conclusion of this piece, this note forecasts the future of "exigent circumstances" and points out what types of issues will arise from increasing police discretion.

I. CONSTITUTIONAL SAFEGUARDS

A. *The Fourth Amendment as an Affirmative Limitation on the Authority of Any Government Agent to Intrude Upon the Personal Rights of an Individual*

The power of the government to search, seize, and arrest is an incredible power.[14] The text of the Fourth Amendment proscribes limitations to this power[15] and is a safeguard against unreasonable search and seizures.[16] Viewed this way, the Fourth Amendment is a textual barrier mounted between individual rights and governmental authority.[17] A search occurs when a person expects privacy in the thing being searched and society believes that expectation is reasonable.[18] At this point, and barring any exception, the Fourth Amendment requires that police must obtain a

14 *See* MICHAEL PALMIOTTO, CRIMINAL INVESTIGATION 30 (Michael Palmiotto et al. eds., 3d ed. 2004).

15 U.S. CONST. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, *shall not be violated* . . . .") (emphasis added).

16 *See King II*, 131 S. Ct. 1849, 1856 (2011) (Under the Fourth Amendment, "searches and seizures inside a home without a warrant are presumptively unreasonable") (citing Brigham City v. Stewart, 547 U.S. 398, 403 (2006)).

17 Brown v. Walker, 161 U.S. 591, 637 (1896) (Field, J., dissenting) (explaining that there has been a "long struggle between the opposing forces of the spirit of individual liberty on the one hand and the collective power of the State on the other").

18 Katz v. United States, 389 U.S. 347 (1967). *Contra* United States v. Vega, 221 F.3d 789, 798 (5th Cir. 2000) (holding that an expectation of privacy in a residence is subjective).

search warrant,[19] and this warrant must be supported by probable cause.[20] For this reason, the Fourth Amendment sets forth a crucial check on the awesome power of the government to intrude upon people's privacy—it is an affirmative limitation.[21] Over the years, courts have developed a number of exceptions to the warrant requirement.[22] These exceptions include: consent,[23] plain view,[24] motor vehicles,[25] search incident to lawful arrest,[26] protective sweeps,[27] companion pat–downs,[28] and exigent circumstances.[29] In the event that a warrantless search is conducted without a valid exception, the general remedy is evidence suppression at trial.[30]

B. How Exigent Circumstances Work

Exigent circumstances overcome the presumption that warrantless searches are unreasonable when the exigencies of the situation "make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment."[31] This doctrine allows police to enter a home without obtaining a warrant, effectively sidestepping Fourth Amendment protections.[32] However, in determining

19 U.S. CONST. amend. IV.

20 *King II*, 131 S. Ct. at 1856 (citing U.S. CONST. amend. IV).

21 *See Katz*, 389 U.S. at 351 ("The Fourth Amendment protects people . . . ."). *See generally* Garcia, *supra* note 12, at 1–2 (noting that the scope of criminal procedural rights stems from safeguards in the "value–laden" Bill of Rights).

22 These exceptions are not absolute and are subject to judicial review. *See* Coolidge v. New Hampshire, 403 U.S. 443, 461 (1971) (holding that exceptions to the warrant requirement are not talismans precluding further judicial inquiry whenever they are invoked); Jones v. United States, 357 U.S. 493, 499 (1958) (noting that exceptions to the warrant requirement are "jealously and carefully drawn"); *see also* Chimel v. California, 395 U.S. 752, 762 (1969) (quoting United States v. Jeffers, 342 U.S. 48, 51 (1951)) ("The general requirement that a search warrant be obtained is not lightly to be dispensed with, and the burden is on those seeking [an] exemption [from the requirement] to show the need for it . . . .").

23 Illinois v. Rodriguez, 497 U.S. 177 (1990).

24 Horton v. California, 496 U.S. 128 (1990).

25 Arizona v. Gant, 556 U.S. 332 (2009).

26 United States v. Robinson, 414 U.S. 218, 235 (1973).

27 United States v. Neal, No. 11–028 Section: R(3), 2011 U.S. Dist. LEXIS 110610 (E.D. La. Sept. 28, 2011).

28 Owens v. Commonwealth, 291 S.W.3d 704, 708 (Ky. 2009) (citing United States v. Berryhill, 445 F.2d 1189, 1193 (9th Cir. 1971)).

29 *King II*, 131 S. Ct. 1849, 1852 (2011) (citing Mincey v. Arizona, 437 U.S. 385, 394 (1978)) (noting that one exception to the warrant requirement is exigent circumstances).

30 *See* United States. v. Chambers, 395 F.3d 563 (6th Cir. 2005) ("[S]uppression is required of any items seized during [an unlawful] search.").

31 *King II*, 113 S. Ct. at 1856 (citing *Mincey*, 437 U.S. at 394)).

32 Payton v. New York, 445 U.S. 573, 590 (1980) ("Absent exigent circumstances, the threshold to a house may not reasonably be crossed without a warrant.").

whether exigent circumstances exist to allow police officers entry into a home without a warrant, courts have been split on how to measure this exception.[33] In fact, at one point, at least five different tests existed to determine the validity of exigent circumstances among the federal circuits and several other variations among state courts.[34] To turn a disputed doctrine into a tempest, some courts, including Kentucky state courts, carved out an exception to this exception: the "police–created" exigency.

The police–created exigency doctrine holds that when police create or manufacture an exigent circumstance, a warrantless search is not justified.[35] Undeniably, this way of measuring whether a valid exigent circumstance exists in a particular case depends on the intent of the police officers, a subjective measure. The Fourth Circuit, Eighth Circuit, Arkansas Supreme Court, and Kentucky Supreme Court have all gauged this idea by considering whether it was foreseeable that the police actions would create an exigency.[36] This exigency is essentially an exception to an exception and re–invokes the Fourth Amendment warrant requirement. Prior to *King II*, different jurisdictions did not agree on how to determine when police-created the exigency impermissibly and whether or not this should negate the warrantless exception.[37]

The United States Supreme Court took occasion to "solve" this problem when it granted certiorari to hear *King II*. To understand how this situation came to light, it is important to know the facts surrounding Hollis King and what occurred on October 13, 2005 during a police operation near his residence.

33 *Compare* United States v. Mowatt, 513 F.3d 395, 399 (4th Cir. 2008) (using a subjective measure), United States v. Coles, 437 F.3d 361, 367 (3d Cir. 2006) (focusing on police action), Ewolski v. City of Brunswick, 287 F.3d 492, 504 (6th Cir. 2002) (evaluating subjective police conduct), *and* United States v. Rengifo, 858 F.2d 800, 804 (1st Cir. 1988) (looking at bad faith on part of police officer), *with* United States v. MacDonald, 916 F.2d 766, 772 (2d Cir. 1990) (exigencies must be objectively reasonable).

34 *See* Petition for Writ of Certiorari at 11, *King II*, 131 S. Ct. 1849 (No. 09–1272), 2010 U.S. S. Ct. Briefs LEXIS 2062 at 20.

35 *King I*, 302 S.W.3d 649 (Ky. 2010).

36 *See Mowatt*, 513 F.3d at 400–03; United States v. Duchi, 906 F.2d 1278, 1284–85 (8th Cir. 1990); Mann v. State, 161 S.W.3d 826, 834 (Ark. 2006); *Id.* at 649–56..

37 *See King II*, 131 S. Ct. 1849, 1858–62 (2011).

II. The Story of Hollis King

A. Facts of King[38]

In 2005, police took part in a "controlled buy"[39] in a parking lot next to an apartment building.[40] During the controlled buy, the suspect fled on foot into the apartment complex. Through radio communication, two police officers involved in the controlled buy heard that the suspect had entered the breezeway of the apartment building.[41] As the chasing police officers entered the breezeway, they heard a door shut somewhere towards the end, but did not know if it was a door on the left or the right side of the breezeway. As they approached the midpoint of the breezeway, they began to smell marijuana emanating from the right side door of the apartment building. The police guessed that the fleeing suspect had entered that apartment because of the odor of marijuana (the suspect had in fact entered the door on the left).[42] From there, the police knocked and announced their presence and, after hearing movement inside and fearing that evidence might be being destroyed, entered the apartment by kicking in the door. Once inside the apartment, the police performed a protective sweep and discovered marijuana and Hollis King.[43] King was indicted for trafficking in a controlled substance (first degree), possession of marijuana, and persistent felony offense (second degree).[44]

B. King*'s Procedural History and the Doctrine Created by* King I

Prior to trial in the Fayette County Circuit Court, King argued that the entry was unlawful and, being unlawful, the evidence should be suppressed pursuant to the Fourth Amendment. The motion to suppress was denied

38 A detailed account of the facts as found by the trial court and adopted by the appeals court is being provided at this juncture because the Kentucky Supreme Court and United States Supreme Court adopted these findings of fact.

39 This is a scenario where police officers purchase drugs from a suspected drug dealer in an effort to bring trafficking charges against them. For a detailed discussion of controlled buys and the related doctrine of entrapment see *Morrow v. Commonwealth*, 286 S.W.3d 206 (Ky. 2009), *Wyatt v. Commonwealth*, 219 S.W.3d 751 (Ky. 2007), and Ky. Rev. Stat. Ann. § 505.010 (LexisNexis 2008).

40 King v. Commonwealth, No. 2006–CA–002033–MR, 2008 WL697629, at *1 (Ky. Ct. App. Mar. 14, 2008).

41 *Id.* at 3.

42 This fact pattern is particularly intriguing and the author wonders why the court accepted the argument by the Commonwealth that the police reasonably believed the fleeing cocaine dealer fled the scene of a controlled buy only to go into his apartment and immediately begin smoking marijuana.

43 Shortly after arresting King, police found the original suspect in a different apartment (across the hall, on the left). *King II*, 131 S. Ct. 1849, 1859–60 (2011).

44 *King v. Commonwealth*, 2008 WL697629, at *1-2.

and King subsequently pleaded guilty and was sentenced to ten years imprisonment.[45] The trial court reasoned that the police smelled marijuana (creating probable cause), heard movement inside (giving weight to the argument that the police believed that evidence was being destroyed), and thus, because probable cause and exigent circumstances existed, a warrantless entry was justified.[46]

King appealed the decision to the Kentucky Court of Appeals, contending that the denial of the suppression motion was erroneous because the entry and search violated the Fourth Amendment and directly challenging the trial court's legal finding "because it was unsupported by probable cause and exigent circumstances."[47] The Kentucky Court of Appeals applied a *de novo* review of the trial court's application of the law[48] and adopted all of the trial court's findings of fact.[49]

The Kentucky Court of Appeals, in an unpublished opinion, held that because the police were pursuing a suspected cocaine dealer to a specific apartment building, and because they thought evidence was being destroyed, the police did not need a warrant.[50] This decision was problematic for several reasons as the court of appeals agreed with the trial court's decision but disagreed with the lower court's legal analysis.[51] In highlighting these differences, it is worth noting that the trial judge held that exigent circumstances existed under the destruction of evidence doctrine coupled with probable cause because of the smell of marijuana. The court of appeals viewed this as incorrect and reasoned that "[t]he correct standard . . . is whether or not the officers reached a reasonable conclusion [to enter the left apartment] based on facts known to them at the time of the forced entry."[52] In King's case, the court of appeals reasoned that police officers could not enter the apartment after smelling marijuana and knocking on the door to announce themselves on the premise that evidence was being destroyed because this created the exigency.[53] According to the court, this search was invalid, even if the police had probable cause to

45 *Id.* at 5–6. Of note, typically a right to appeal in Kentucky is waived when a criminal defendant pleads guilty. However, in King's case, he pleaded guilty on the condition that he reserved the right to appeal the evidentiary ruling.

46 *Id.*

47 *Id.* at 7.

48 To this application of law, the trial court received absolutely no deference. *Id.* (citing Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998)).

49 *Id.* at 8.

50 *Id.* at 15–16.

51 *Id.* at 9 ("Although the trial court's ruling was that the warrantless entry was valid was correct, we disagree with its legal analysis and now state the correct rule of law.").

52 *Id.* at 15

53 *Id.* at 12–13 (citing United States v. Williams, 354 F.3d 497, 504–05 (6th Cir. 2003)).

believe that a crime had been committed.[54] Ultimately, the court of appeals reasoned that the particular circumstances of the case plus the fact that the police did not intentionally try to evade the warrant requirement gave rise to the entry under the good–faith exception of exigent circumstances.[55]

The fact that the appeals court affirmed the suppression ruling but disagreed as to the correct application of the law highlights that the concept of exigent circumstances can be difficult to apply. Senior Judge Buckingham, the lone dissenter, opined that the good–faith exception was not applicable and cautioned against this precedent because it would extend the good–faith exception to scenarios in which police officers are not acting under the authority of a search warrant and also to situations where officers are mistaken as to whether circumstances justify warrantless entry.[56] Judge Buckingham pointed out that applying subjective good–faith standards was a split legal issue among the circuits and felt that the Kentucky Court of Appeals was blindly following Sixth Circuit law "without at least considering the view of the other circuits on this issue."[57]

King's case was appealed to the Kentucky Supreme Court for further review of whether the entry was lawful under existing legal doctrine. The Kentucky Supreme Court carefully considered the various doctrinal components of exigent circumstances before creating and applying a new two–prong test to evaluate police–created exigent circumstances in *King I*. [58] In short, they explicitly combined a two–prong test developed in the Fifth Circuit with a "reasonably foreseeable" component from Arkansas case law.[59] The Kentucky Supreme Court also cited to the Eighth Circuit,[60] saying that the inquiry should be focused on the reasonableness of investigative tactics that generated the exigency.[61] In adopting this test, the Kentucky Supreme Court observed that "[w]ith the exception of the Second Circuit, these various approaches are similar, and will usually reach the same result."[62]

With this in mind, it is important to consider the case law across the various circuits and notable state decisions on exigent circumstances

54 *Id.* at 12 (citing *Williams*, 354 F.3d at 504–05).

55 *Id.* at 15.

56 *Id.* at 22 (Buckingham, J., dissenting).

57 *Id.* at 23 (Buckingham, J., dissenting). Senior Judge Buckingham also evaluated the "hot pursuit" doctrine and noted that it did not apply because it requires that the suspect know that police are pursuing him. *Id.* The "hot pursuit" issue was considered by the Kentucky Supreme Court and disregarded. The United States Supreme Court declined to review this issue on certiorari. *See* Order Granting Certiorari at 1, *King II*, 131 S.Ct. 1849 (2011) (No. 09–1272).

58 *King I*, 302 S.W.3d 649, 652–57 (Ky. 2010).

59 *Id.* at 656; *see also* Mann v. State, 161 S.W.3d 826, 832 (Ark. 2006).

60 United States v. Duchi, 906 F.2d 1278 (8th Cir. 1990).

61 *King I*, 302 S.W.3d at 655.

62 *Id.* at 656.

prior to discerning the interplay between the Kentucky and the United States Supreme Courts' decisions. This will later serve to underscore the potential shortcomings in the United States Supreme Court's opinion and will illustrate a discernible difference between the flow of the doctrinal components of exigent circumstances as a basis to perceive why the United States Supreme Court decided to create a binding, objective exigent circumstances test.

III. Considering the Split

A. Exigent Circumstances Acting as a Limitation to Police Action: Subjective and Objective Approaches Among the Federal Circuit and State Courts Before King I *and* King II

Prior to *King I*, case law on exigent circumstances was still evolving. The circuits were very different in their approaches and even as recent as six years before *King II* at least one circuit had yet to decide upon a proper inquiry as to the validity of exigent circumstances and police intent.[63]

B. The Federal Circuits

The First and Seventh Circuits used an "unreasonable delay in obtaining a warrant" standard. In general, this test simply looked at whether the police officer deliberately avoided or unreasonably delayed obtaining a warrant.[64] If so, then the entry was invalid. On its face, this test granted courts the ability to consider the subjective intentions of police officers and arguably granted judges significant discretion in ruling on entry challenges. Conversely, the Second Circuit's test prior to *King II* asked whether police acted in a manner consistent with the law.[65] This test was purely objective in its approach and did not consider the officer's subjective intentions.[66] This test was the most deferential to police action and restricted the courts' ability to consider factors outside of objective inquiries—it severely limited the courts' ability to consider police intentions.

The Sixth Circuit asked whether the police officer unreasonably delayed obtaining a warrant coupled with whether there was deliberate

63 *See* United States v. Coles, 437 F.3d 361 (3d Cir. 2006).

64 *See* United States v. Rengifo, 858 F.2d 800 (1st Cir. 1988) (holding that government officials who deliberately delay or avoid obtaining a warrant cannot rely on the exigent circumstances exception); *see also* United States v. Berkwitt, 619 F.2d 649, 654 (7th Cir. 1980) (holding that because the exigency did not arise from unreasonable delay on apart of the police officers, a valid exigency existed).

65 United States v. MacDonald, 916 F.2d 766, 772 (2d Cir. 1990).

66 *Id.*

conduct on the part of the officer to evade the warrant requirement.[67] This was similar to the First and Seventh Circuit's approach but with an added inquiry allowing the court to overtly consider a police officer's bad faith or conduct. This test presented a middle ground between the First and Seventh Circuit test with the Second Circuit test. Under this test, a court could consider objective factors (i.e. the time delay in obtaining a warrant) with subjective factors of the case (e.g. police officer's intents on avoiding the warrant requirement).[68] The D.C. Circuit test was similar to the Sixth Circuit's in that "[a]s long as police measures are not deliberately designed to invent exigent circumstances, we will not second–guess their effectiveness."[69] The tests in the Ninth and Tenth Circuits followed along these general lines.[70] While the tests in these jurisdictions appeared to be deferential to police actions, they nonetheless allowed courts to measure subjective intent.

The Third and Fifth Circuits employed a two–part test.[71] This test clearly originated in the Fifth Circuit and was later adopted by the Third Circuit.[72] The first part of the test was to consider if police-created the exigency to purposefully evade the warrant requirement and then to determine whether, even without bad faith, the police action in creating the exigency was unreasonable to preclude the warrant requirement.[73] Under the case law in these circuits, warrantless entry was invalidated if the officer's actions were considered unreasonable.[74] This inquiry contained both subjective and objective components—purposeful police action (subjective) and unreasonable police action (objective)—and granted a significant amount of discretion to the courts.[75]

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67 Ewolski v. City of Brunswick, 287 F.3d 492, 504 (6th Cir. 2002) (quoting United States v. Campbell, 261 F.3d 628, 633–34 (6th Cir. 2001)) ("[There must be] deliberate conduct on the part of the police evincing an effort intentionally to evade the warrant requirement" in order to negate a valid finding of exigent circumstances).

68 *See id.*

69 United States v. Socey, 846 F.2d 1439, 1449 (D.C. Cir. 1988).

70 *See* United States v. VonWillie, 59 F.3d 922, 926 (9th Cir. 1995) ("This is not a case where the government purposely tried to circumvent the requirements of [the knock and announce statute]."); *see also* United States v. Carr, 939 F.2d 1442 (10th Cir. 1991) (holding that where police officers approached a motel room in which they believed narcotics activity was occurring, they did not themselves create the exigency even if they expected the exigency (in this case, destruction of evidence) to occur).

71 *See* United States v. Coles, 437 F.3d 361 (3d Cir. 2006); United States v. Gould, 364 F.3d 578 (5th Cir. 2004).

72 The Third Circuit observed that the Second Circuit and Fifth Circuit took opposite approaches to evaluating exigent circumstances and decided that the Fifth Circuit's test was the superior approach because it focused on the Fourth Amendment inquiry of reasonableness of police action. *See Coles*, 437 F.3d at 367–70.

73 *Gould*, 364 F.3d at 590.

74 United States v. Rico, 51 F.3d 495, 502 (5th Cir. 1995).

75 *See, e.g.*, *Gould*, 364 F.3d at 590; *Rico*, 51 F.3d at 502.

The Fourth Circuit's case law held that when police officers could reasonably foresee that their actions would create exigent circumstances and those actions did in fact create those circumstances, then warrantless entry under the doctrine was not valid.[76] The Eighth Circuit adopted the test used in the Fourth Circuit.[77]

C. State Courts

Many states used variations of the different Federal Circuit tests. Arkansas used a test similar to the Eighth Circuit which inquires generally if it was reasonably foreseeable that "the investigative tactics employed by the police would create the exigent circumstances relied upon to justify warrantless entry," regardless of good faith.[78] The answer to addressing the appropriateness of exigencies, according to Arkansas law, is "how did those . . . circumstances come about? . . . This antecedent inquiry—into the reasonableness and propriety of the investigative tactics that generated the exigency—is . . . the principled way to evaluate whether the officers created the exigent situation."[79]

In New Hampshire, the exigent circumstances test of a police-created exigency was viewed under the totality of the circumstances, and the court also considered whether there was undue delay in securing a warrant.[80] The Pennsylvania state courts used a similar test in that they determined whether exigent circumstances existed by an "examination of all of the surrounding circumstances in a particular case."[81] Additionally, Colorado state courts had three exigent circumstances exceptions for police and an additional six balancing factors to determine whether a warrantless intrusion into the home based on exigent circumstances was reasonable.[82] Like the Kentucky Supreme Court's test, these tests address the reasonableness of the circumstances surrounding police entry. This allowed courts to consider all relevant circumstances, including objective and subjective inquires. The scope of these tests is appropriate because the Fourth Amendment should protect against all *unreasonable* searches. The text of the Fourth Amendment does not say that the people shall be free of "objectively" unreasonable searches; it projects individuals from

76 United States v. Mowatt, 513 F.3d 395, 400–03 (4th Cir. 2008).

77 United States v. Duchi, 906 F.2d 1278, 1284–85 (8th Cir. 1990).

78 Mann v. State, 161 S.W.3d 826, 834 (Ark. 2006) (citing *Duchi*, 906 F.2d at 1278).

79 *Id.*

80 State v. Sanatana, 586 A.2d 77 (N.H. 1991).

81 Commonwealth v. Melendez, 676 A.2d 226, 229 (Pa. 1996) (citing Commonwealth v. Peterson, 596 A.2d 172 (1991)).

82 People v. Aarness, 150 P.3d 1271 (Colo. 2006).

all unreasonable searches.[83] Even an objectively reasonable search can be subjectively unreasonable.

IV. *KING I*: A UNANIMOUS KENTUCKY SUPREME COURT DECISION

The Supreme Court of Kentucky granted review to address the issue of whether exigent circumstances existed in King's case. The Kentucky Supreme Court accepted all of the circuit court's findings of fact and reviewed the law under a *de novo* standard.[84]

The Commonwealth relied on the court of appeals' ruling that (1) entry was justified because of the smell of marijuana and (2) that because the police heard movement inside, the police could enter to prevent the destruction of evidence.[85] The Kentucky Supreme Court disagreed with the idea that odor alone was sufficient to justify a warrantless entry[86] and further held that a warrantless entry was not justified by the exigent circumstances doctrine of "imminent destruction of evidence."[87] Kentucky cited to United States Supreme Court case law, holding "[w]here there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation."[88] This exigency requires probable cause, in this case, imminent destruction of evidence.[89] Because smell was not enough to justify entry, the Court reasoned that the sounds the police heard after they had knocked and announced themselves at the door were the only remaining reason for entering King's home.[90]

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83 *See* U.S. CONST. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."). It is worth observing that the Framers' did not write the Fourth Amendment to specify "objectively unreasonable searches." This restraint on the Fourth Amendment's protection is a beast created by the courts.

84 *King I*, 302 S.W.3d 649, 653 (Ky. 2010).

85 *Id.*

86 Johnson v. United States, 333 U.S. 10, 11–15 (1948). The Kentucky Supreme Court did recognize a public safety exception, see Bishop v. Commonwealth, 237 S.W.3d 567 (Ky. App. 2007) (holding that a meth-like smell created an exigent circumstance due to the inherent dangers in producing meth), but rejected the notion that a public safety issue concerned the case at hand. *Id.* at 569. The Court noted that since probable cause existed based on the smell of marijuana, the police could have gotten a warrant. *King I*, 302 S.W.3d at 653–54.

87 *King I*, 302 S.W.3d at 654.

88 *Id.* (quoting Roaden v. Kentucky, 413 U.S. 496, 505 (1973)).

89 *Id.* (citing Posey v. Commonwealth, 185 S.W.3d 170, 174 (Ky. 2006)).

90 *Id.* The court questioned whether there was enough "sound" to indicate that evidence was being destroyed inside but for the "purpose of argument that exigent circumstances existed" the court assumed that exigent circumstances did exist. *Id.* at 655. This allowed them to determine "the more important question of whether police-created their own exigency." *Id.* This is important to highlight this because ultimately, the issue that was decided by the United States Supreme Court was what standard should apply to deciding exigent circum-

In rejecting the prosecution's second contention (the issue of the police-created exigency), the Kentucky Supreme Court could have relied on the first ruling—that the odor of marijuana did not create a justifiable exigency. If no exigency existed giving rise to the suspicion that a crime was being committed (smoking marijuana), then entry to prevent the destruction of evidence would be unjustified because there would be no probable cause in the first place.[91] Surprisingly, the Kentucky Supreme Court took this opportunity to simply assume that exigent circumstances existed to get to the argument of bad-faith, subjective entry.[92]

To evaluate the police-created exigency, the court adopted a two-part test.[93] The first prong comes from the Fifth Circuit, which asks whether the officers deliberately created the exigent circumstances to avoid the warrant requirement (bad-faith).[94] The second part comes from Arkansas and requires a court to "determine whether, regardless of good faith, it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify a warrantless entry."[95] In short, the court held that any exigency was

stances. If the Kentucky Supreme Court had not "assumed" that an exigent circumstance existed, then this case would not have been reviewed by the United States Supreme Court.

91 *See id.* at 655.

92 This is striking considering that the Kentucky Supreme Court did not need to expand the opinion to cover this idea; the case could have ended by holding that the smell of burning marijuana did not give rise to warrantless entry but did give rise to probable cause and the police could therefore have attempted to get prior judicial approval. *See Id.* at 653–55. In responding to Petitioners request for cert, Respondents referred to this part of the opinion and the entire issue as an advisory opinion. *See* Brief for Respondent, *King II*, 131 S. Ct. 1849 (2011) (No. 09–1272), 2010 U.S. S. Ct. Briefs LEXIS 2069.

93 The Kentucky Supreme Court explained that it is a "well established principle that police may not rely on an exigent circumstance of their own creation." *King I*, 302 S.W.3d at 655 (citing United States v. Chambers, 395 F.3d 563, 566 (6th Cir. 2005)); United States v. Duchi, 906 F.2d 1278, 1284 (8th Cir. 1990); United States v. Thompson, 700 F.2d 944, 950 (5th Circuit 1983). The court noted that this issue of police-created exigencies was a case of first impression. *King I*, 302 S.W.3d at 655. In forming the background for its analysis, the court relied on precedent from the Fifth, Sixth, and Eighth Circuits. *Id.* (citing *Chambers*, 395 F.3d at 566; *Duchi*, 906 F.2d at 1284). The issue, according to the Kentucky Supreme Court, was recognized in *Duchi* in that police always create exigent circumstances that justify warrantless entries and arrests. An example plays out like this: Mr. Smith is inside his home breaking the law. The police knock on the door and announce themselves. Mr. Smith stops breaking the law because the police are at his home. If the police do not enter the home, the evidence might disappear so they have to either enter without a warrant or lose the evidence even though they caused Mr. Smith to stop breaking the law, thus creating the exigency (to prevent destruction of the evidence).

94 *King I*, 302 S.W.3d at 656.

95 Mann v. State, 161 S.W.3d 826, 834 (Ark. 2006). The author is inclined to believe that if the Arkansas standard is really any different from the second prong of the Fifth Circuit, that the difference seems to be semantics, and even if police did not do it in bad faith (whether in Arkansas or in the Fifth Circuit), were the actions that created the exigency unreasonable so as to preclude dispensation with the warrant requirement, then it would have been reason-

police–created and not reasonable and that no "good faith" exception to the exclusionary rule applied in this case.[96] This test, containing both a subjective and objective level of inquiry, granted the court a significant amount of discretion to consider all relevant facts in determining whether police entry is unlawful.[97] The Attorney General of Kentucky appealed Hollis King's case to the United States Supreme Court.[98]

V. *KING I* BEFORE THE SUPREME COURT

A. Commonwealth's Petition for Certiorari

It is important to consider the context in which King's case came under review before the United States Supreme Court. Ultimately, King won in Kentucky. The Attorney General of Kentucky ("Commonwealth") filed for certiorari before the United States Supreme Court. In its petition for certiorari, the Commonwealth argued that there were several tests being used among the circuits to consider whether police have impermissibly created an exigency[99] and that these tests were so different that courts would reach entirely different results even given identical facts.[100] The Commonwealth applied the various tests to King's case,[101] ultimately arguing that in eight circuits, the Commonwealth would have won whereas in four circuits, King would have won.[102]

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ably foreseeable that the exigency would occur and also be inherently in bad faith. For further consideration of this issue, see *King I*, 302 S.W.3d at 655–56 (citing United States v. Gould, 364 F.3d 578, 590 (5th Cir. 2004)).

96 *King I*, 302 S.W.3d at 651.

97 The Court held the idea of a good–faith search exception deals only with warrants that are invalidated for lack of probable cause and not to warrantless entries. *Id.* at 657. This type of search was established in the 1980s. *See* United States v. Leon, 468 U.S. 897 (1984).

98 Petition for Writ of Certiorari, *supra* note 34, at 20.

99 *Id.*

100 *Id.* This is interesting considering that the legal interpretations of the various tests by Petitioner are completely different then the legal interpretations of the tests by the Justices of the Kentucky Supreme Court in *King I*. The Kentucky Supreme Court explicitly said that with the exception of the Second Circuit, the results were the same and the evidence would have been suppressed in every circuit except for the Second Circuit, whereas Petitioner argued and concluded in the petition for certiorari that the results would have yielded drastically different results in most circuits.

101 Petition for Writ of Certiorari, *supra* note 34, at 20–26. This is particularly intriguing to the author. The Petitioner essentially played the role of the judge in every circuit across the nation and told the Supreme Court how the issue of evidence suppression would end up. An interesting tactic but so clearly at odds with the Kentucky Supreme Court opinion, one wonders how seriously the United States Supreme Court considered the argument. Obviously, it was convincing enough to merit a grant of review.

102 *Id.* at 22–23. Under the Fifth and Seventh Circuit's jurisprudence, the Commonwealth argued King would have lost the case on the ground that the police had no time to obtain a search warrant (so no unreasonable delay) because they thought they were pursuing

The Commonwealth asked the Court to consider "whether police can impermissibly create exigent circumstances and, if so, to acknowledge and resolve the current conflict among the circuits, and set forth an effective and simple test."[103] Finally, the Commonwealth asked the Court to adopt the test employed in the Second Circuit (not surprisingly, the test that grants police the most deference—a purely objective level of inquiry).[104]

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a suspect who knew he was being chased by the officers. *Id.* at 20–22. Petitioner also argued that the Commonwealth would have won the suppression hearing under the test used by the Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits. *Id.* at 21 (citing Ewolski v. City of Brunswick, 287 F.3d 492, 504 (6th Cir. 2002); United States v. VonWillie, 59 F.3d 922, 926 (9th Cir. 1995); United States v. Carr, 939 F.2d 1442 (10th Cir. 1991); United States v. Tobin, 923 F.2d 1506 (11th Cir. 1991)). Petitioner reasoned that, like the Fifth and Seventh Circuit's stance on exigent circumstances, these circuits consider the unreasonable delay factor but also "look for deliberate conduct in an effort to purposefully evade the warrant requirement." *Id.* at 21 (citing *Ewolski*, 287 F.3d at 504; *VonWillie*, 59 F.3d at 926; *Carr*, 939 F.2d 1442; *Tobin*, 923 F.2d 1506). In addition, petitioner argued that the Commonwealth would have won in the Second Circuit on the grounds that the police did not act illegally and therefore, did not create the exigency. *Id.* at 21 (citing United States v. MacDonald, 916 F.2d 766, 772 (2d Cir. 1990)). This is interesting because at issue in the entire case was whether the police violated or did not violate the Fourth Amendment (i.e. whether they acted legally or illegally). Within this argument and applying the second circuit's test, undoubtedly, Petitioner makes a large assumption.

In contrast, Petitioner theorized that King would have prevailed using the Third and Fifth Circuit's test and also under the Fourth and Eighth Circuit's test, respectively. *Id.* at 21. Petitioner noted that, like the Kentucky Supreme Court, the Fifth and Eighth Circuits look to the foreseeability of police actions. *Id.* at 21–22 (citing United States v. Mowatt, 513 F.3d 395 (4th Cir. 2008); United States v. Duchi, 906 F.2d 1278 (8th Cir. 1990)). No further explanation on how King would have won under the foreseeability argument was provided by Petitioner's brief. King would have prevailed under the Fourth and Eighth Circuit's doctrine because these courts consider whether the police acted in bad faith, based on the subjective intentions of the police officers and whether they created the exigency by knocking on the door on purpose. *Id.* at 22. So because they knocked on the door *after* they smelled marijuana and entered on the premise that evidence was being destroyed, the police effectively created their own exigency and the entry would not have been lawful within these circuits, according to Petitioner.

103 Petition for Writ of Certiorari, *supra* note 34, at 23.

104 *Id.* at 23–24. It is worth noting that what Petitioner represented as the best test is the test that gives the most discretion to police officers. *See King I*, 302 S.W.3d 649, 656 (Ky. 2010) (noting that the Second Circuit gives the most deference to law enforcement). An amicus brief was filed on behalf of the petitioner. The *amici* was composed of groups including Americans for Effective Law Enforcement, Inc. (a non-profit organization that has filed over 100 amicus briefs before the Supreme Court). Not suprisingly, the *amici* supported a purely objective test, which they labeled a "totality of the circumstances test." Amicus Brief Supporting Petitioners, *King II*, 131 S. Ct. 1849 (2011) (No. 09-1272), 2010 U.S. S. Ct. Briefs, LEXIS 2098. This, according to the *amici*, "would look at the totality of the circumstances to determine whether officers' warrantless entries . . . pursuant to exigent circumstances is proper under the Fourth Amendment." *Id.* at 6. In support, the *amici* argued that subjective tests "reward illegal action in response to a lawful knock on the door by police." *Id.* at 5. The *amici* stated that courts have adopted this rule to negate the exigent circumstances exception to the warrant requirement. *Id.* The *amici* noted that the test for probable cause does not include subjectivity. *Id.* at 11 (citing Whren v. United States, 517 U.S. 806, 818 (1996)) ("Subjective intentions play no role

B. Response to Petitioner

King[105] contended that the Kentucky Supreme Court assumed that exigent circumstances existed to issue an advisory opinion on the proper test for evaluating created–exigency cases and cautioned the United States Supreme Court against granting *cert.*[106] King argued that the Court of Appeals applied the same "totality of the circumstances test" that the *amici* asked the United States Supreme Court to adopt.[107] King cautioned against reversing *King I* because if moving around inside a home gives police probable cause to believe that evidence is being destroyed,[108] then an exigency is always created that police can rely on for home entry.[109] Furthermore, King emphasized that the touchstone of the Fourth Amendment is "reasonableness" which is inherently a fact intensive, amorphous concept.[110]

VI. NOT READING THEIR MINDS: THE OBJECTIVE VIEW ADOPTED BY THE UNITED STATES SUPREME COURT

A. King II *Before the United States Supreme Court*

The United States Supreme Court granted certiorari to consider "when does lawful police action impermissibly 'create' exigent circumstances which preclude warrantless entry; and which of the five tests currently being used by the United States Courts of Appeals is proper to determine when impermissibly created exigent circumstances exist?"[111] In relating

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in ordinary probable–cause Fourth Amendment analysis."). Even though the *amici* couched their test in different terms, the objective nature of the test is the same as the test used in the Second Circuit.

105 Respondent, the Department of Public Advocacy, is a Commonwealth–wide organization representing indigent Kentucky residents.

106 Brief for Respondent, *supra* note 92, at 2.

107 *Id.* at 5; *see also* Brigham City v. Stuart, 547 U.S. 398 (2006). This case was reviewed by the Supreme Court to consider and resolve the "differences among state courts and the Courts of Appeals concerning the appropriate standard governing warrantless entry by law enforcement in an emergency situation. *Id.* at 402. The Supreme Court held that police action is "reasonable" under the Fourth Amendment "regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify the action." *Id.* at 404. Therefore, this test is technically already binding on the courts.

108 Courts presume that a knock and announce procedure done by police will be followed by sounds of movement inside the residence. *See* Hudson v. Michigan, 547 U.S. 586, 594 (2006) (The knock and announce rule "assures the opportunity to collect oneself before opening the door.").

109 Brief for Respondent, *supra* note 92, at 11.

110 *Id.* at 19.

111 Order Granting Certiorari, *supra* note 57, at 1; Petition for Writ of Certiorari, *supra* note 34, at 2.

the procedural record,[112] the United States Supreme Court said that the Kentucky Supreme Court reversed the lower courts by assuming exigent circumstances existed and questioning whether the sounds of a person moving were sufficient to establish that evidence was being destroyed. The Court also related that Kentucky then applied a two prong test inquiring first into bad faith by the police to avoid the warrant requirement and second, that absent bad faith, exigent circumstances do not apply when police can reasonably foresee their investigative tactics would create the exigency.[113]

B. King *Loses Crown*

In its analysis, the United States Supreme Court carefully worked through a selective history of exigent circumstances, reasonableness, and police action.[114] The Court identified the fact that the circuits were split on what test to apply when evaluating the "reasonableness of the exigent circumstances."[115] The Court said the judiciary requires more than just proof of a fear of the detection, because, as stated by the United States Court of Appeals for the Eighth Circuit, "in some sense, police always create

112 Author's note: The United States Supreme Court said that King plead guilty and was sentenced to 11 years while the Kentucky Court of Appeals had in the record that he was sentenced to 10 years.

113 *King II*, 131 S. Ct. 1849, 1855 (2011) (quoting *King I*, 302 S.W.3d 649, 657 (Ky. 2010)). To provide more context, the United States Supreme Court first addressed the decision of the Kentucky Court of Appeals and the Kentucky Circuit Court. They noted that the Kentucky Circuit Court concluded that probable cause existed to allow the officers to investigate the marijuana smell and that knocking on the door and announcing themselves was proper to await a response or consensual entry. *Id.* at 1855. Further, the United States Supreme Court noted that the court of appeals held that exigent circumstances justified the warrantless entry "because there was no response at all to the knocking and because [the police officer] heard movement in the apartment which he reasonably concluded were persons in the act of destroying evidence, particularly narcotics because of the smell." *Id.*(quoting *King I*, 302 S.W.3d at 657). Then, the United States Supreme Court stated that the court of appeals held that, because the police did not create the exigency by deliberately avoiding the warrant requirement, exigent circumstances existed. *Id.* (summarizing King v. Commonwealth, No. 2006–CA–002033–MR, 2008 Ky. App. Unpub LEXIS 131 (Ky. Ct. App. Mar. 14, 2008)).

114 *King II*, 131 S. Ct. at 1856 (citing Brigham City v. Stuart 547 U.S. 398, 403 (2006)) (noting that search and seizures without a warrant are presumptively invalid with respect to the 4th amendment); Michigan v. Fisher, 130 S. Ct. 546 (2009) (stating that the presumption of invalid searches may be overcome if there is reasonableness); Mincey v. Arizona, 437 U.S. 385, 394 (1978) (holding that the exigent circumstances doctrine is an exception to the warrant requirement (as long as it is objectively reasonable)).

115 *King II*, 131 S. Ct. at 1857 (citing United States v. Chambers, 395 F.3d 563, 566 (6th Cir. 2005) (observing that lower courts exception to the exception of the "police–created exigency" doctrine that police may not rely on the need to prevent destruction of evidence when the exigency was "created" or "manufactured" by the conduct of the police.").

the exigent circumstances."[116] The solution provided by the United States Supreme Court proved troubling: "The answer to the question before us is that the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense."[117] The Court "clarified" by adding that if police do not create the exigency by engaging or threatening to engage in activity that violates the Fourth Amendment, then warrantless entry to prevent the destruction of evidence is reasonable and will be constitutional.[118] This provided no direction to the lower courts other than telling them to go to the text of the Fourth Amendment—which is invariably the same text from which case law allowing subjective and objective inquiries evolved.

C. One Test to Rule Them All

The United State Supreme Court turned down Kentucky's newly minted test because they disagreed with the bad faith component.[119] Bad faith, according to the high Court, is irrelevant to the extent that police conduct immediately preceding an exigency is reasonable.[120] Such "reasonableness" justifies warrantless entry.[121] Kentucky asked whether the police "deliberately created the exigent circumstances with the bad-faith intent to avoid the warrant requirement" and this level of subjectivity, according to the United States Supreme Court, was inconsistent with Fourth Amendment jurisprudence. At this juncture, the United States Supreme Court overruled and killed the "bad faith" component to all tests.[122]

The United States Supreme Court then overruled all "reasonably foreseeable" tests by stating that this line of reasoning is too subjective in nature and too unpredictable.[123] Then, the Court overruled the "probable cause and time to secure a warrant"[124] factor by stating that this approach "unjustifiably interferes with legitimate law enforcement strategies"

116 *Id.* at 1857 (quoting United States v. Duchi, 906 F.2d 1284 (8th Cir. 1990)).

117 *Id.* at 1858.

118 *Id.*

119 *Id.* at 1859 ("[The bad faith inquiry] is fundamentally inconsistent with our Fourth Amendment jurisprudence.").

120 *Id.*

121 *Id.* The Supreme Court recognized a similar test used in the Ninth Circuit. *See* United States v. MacDonald, 916 F.2d 766, 772 (1990) (stating that law enforcement officers do not impermissibly create exigent circumstances when they act in an entirely lawful manner).

122 *King II*, 131 S. Ct. at 1859.

123 *Id.* Of note, the reasonably foreseeable test simply inquires whether it was foreseeable that the tactics employed by the police would create the exigency in which they then rely to enter a home. *See* Mann v. State, 161 S.W.3d 826, 826–30 (Ark. 2006).

124 *King II*, 131 S. Ct. at 1860.

because there are many reasons that officers may choose to wait to obtain a warrant and then suddenly not have time to obtain one.[125]

The Court stated that knocking on the door and calling out "police" is not a police-created exigency even if the police did not have probable cause.[126] With this new standard, it seems hard to imagine when police action will ever rise to the level of a police-created exigency. Finally, the United States Supreme Court overruled the "standard or good investigative tactics" doctrine.[127] In a handful of paragraphs, the United States Supreme Court wiped out decades of Fourth Amendment jurisprudence that had protected individual rights and limited police power. The Court remanded King's case back to the Kentucky Supreme Court to determine if exigent circumstances existed in the first place.[128]

D. Ginsburg: Saving King?

Justice Ginsburg alone dissented in *King II* but wrote a powerfully compelling cautionary oration against the seemingly unbridled power the majority opinion conferred upon police officers.[129] Ginsburg was concerned with the level of discretion that police officers enjoy unchecked by any

125 Here is a brief example to clarify: a police officer may ask to speak with residents of a home concerning some type of crime. At this point, he may not have enough information or probable cause to make an arrest. After speaking with an individual, something might happen, causing a suspect to flee or hide. At this point, an exigency is created to allow the officer to enter the home or chase the suspect (under the hot pursuit doctrine) at which time he does not have time to get a warrant.

126 *King II*, 131 S. Ct. at 1859. The author finds it interesting that the court opined that the police knocking on the door and calling out "police" during a lawful investigation of a controlled buy was not a police-created exigency even if the police do not have probable cause as to that residence. If this is not a police–created exigency, it would seem that courts would be hard pressed to find any police–created exigencies.

127 *Id.* at 1861.

128 *Id.* at 1863 (citing *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002)) (reversing *King I*, but holding that "[a]ny question about whether an exigency actually existed is better addressed by the Kentucky Supreme Court on remand"). On remand to the Kentucky Supreme Court, the Court concluded that the Commonwealth did not show that evidence was going to be destroyed and held that entry into Hollis King's apartment was unreasonable. *King v. Commonwealth*, No. 2008–SC–000274–DG, 2012 WL 1450081, — S.W.3d — (Ky. 2012). King's conviction was overturned. Interestingly, the Kentucky Supreme Court explained that "[t]he police officers' subjective belief that evidence was being (or about to be) destroyed is not supported by the record . . . ." *Id.* at *3. The fact that the Kentucky Supreme Court even considered the police officers' subjective intent is contrary to *King II*'s holding. This further illustrates that *King II* served only to further confuse the exigent circumstances doctrine and highlights courts' hesitancies to turn away from subjective inquiries when facing a Fourth Amendment issue.

129 Ginsburg's dissent started off powerfully: "In lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down . . . ." *King II*, 131 S. Ct. at 1864 (Ginsburg, J., dissenting).

subjective inquiry.[130] It is readily apparent, however, that her concerns were drowned by a vote of eight in favor of a purely objective standard.

VII. The Reign of *King II*

A. *The Circuits in the Wake of* King II

To no surprise, the Second Circuit has quickly picked up the reasoning in *King II*, since this circuit's case law—more so than any other circuit and largely the stand alone—closely mirrors the test set forth in *King II*.[131] The Third Circuit, represented by the United States District Court for the Eastern District of Pennsylvania, has quoted *King II* in stating that "exigent circumstances does not apply when the exigency is created or manufactured by the conduct of the police" but rather, only applies "when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment."[132]

District courts sitting in the Fourth Circuit seem reluctant to move away from the "totality of the circumstances test" and, while citing to *King II* and the objective standard, consider both a particularized and objective basis for police action.[133] However, case law has made clear that the "totality of the circumstances test" should be measured in objective terms, although there is some indication that courts do not all agree on what "objective" within the reasonableness standard is.[134]

The United States Court of Appeals for the Fifth Circuit has recognized that *King II* no longer allows a court to inquire into whether a claim of exigent circumstances by police was done to bypass the warrant

130 *Id.*

131 *See* United States v. Simmons, 661 F.3d 157 (2d Cir. 2011) (citing *King II*, 131 S. Ct. at 1856) (holding that in determining reasonableness, the test is purely objective).

132 Ernay v. Swatski, No. 10–1035, 2011 U.S. Dist. LEXIS 80814 (E.D. Pa. July 22, 2011) (quoting *King II*, 131 S. Ct. at 1862).

133 United States v. Wallace, 811 F. Supp. 2d 1265, 1272 (S.D.W. Va. 2011) (citing *King II*, 131 S. Ct. at 1859) (holding that a Fourth Amendment analysis is purely objective); *see also* United States v. Starling, No. 3:11–cr–30, 2011 U.S. Dist. LEXIS 130119 (N.D.W. Va. Oct. 14, 2011) (citing United States v. Aryizu, 534 U.S. 266, 273 (2002)).

134 Ohio v. Robinette, 519 U.S. 33, 39 (1996). However, one must question whether sneaking in a "particularized" basis into the totality of circumstances test adds to the "objective" standard by allowing courts to delve more deeply into specific police action. This author believes that it does. *See* United States v. Willis, 443 Fed. Appx. 806, 808 (4th Cir. 2011) (citing *King II*, 131 S. Ct. at 1856) ("Courts have recognized a variety of exigent circumstances justifying a warrantless entry into a home."). However, the court went on to cite to nine factors that allowed warrantless entry including weighing the fact that the police officers delayed their entry to obtain appropriate protection and that the officers involved in entering "believed immediate entry was necessary." *Id.* This consideration seems close to the factor of considering police intent, which was a factor almost entirely disregarded as inappropriate under *King II* (considering bad faith intent). *See King II*, 131 S. Ct. at 1859.

requirement or whether it was reasonably foreseeable that the police action would cause some type of exigent circumstance. In *United States v. Aguirre*, the Fifth Circuit even noted that prior to *King II*, the Fifth Circuit court would have considered the particular police action in the case violative of the Fourth Amendment.[135] The court has categorized *King II* as a decision that "narrowed the police–created exigency doctrine adopted by this and other circuits."[136] Looking to *King II*, the Fifth Circuit's new standard is one that does allow police–created exigencies as long as "the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment."[137]

Thus far, at least one district court in the Sixth Circuit has interpreted *King II* in a slightly different light. Prior to *King II*, the Sixth Circuit had a subjective measure regarding police–created exigencies. Now, to comply with *King II*, the Sixth Circuit focuses on police action "up until the time they enter the house."[138] They have continued by holding that "[a]ny warrantless entry based on exigent circumstances must . . . be supported by a genuine exigency."[139] However, it appears that the Sixth Circuit will still consider whether a police officer deliberately attempted to avoid the warrant requirement.[140] This seems contrary to *King II*. This is especially troubling considering that the United States Court of Appeals for the Tenth Circuit, in light of *King II*, has noted that consideration of bad–faith efforts on the part of police has been taken out of the exigency doctrine.[141]

The Arkansas Supreme Court has recognized that *King II* expressly abrogated the "reasonably foreseeable" test because it produced an "unacceptable degree of unpredictability."[142] However, the court noted that as a matter of Arkansas state constitutional law, it will continue to

135 United States v. Aguirre, 664 F.3d. 606, 611 (5th Cir. 2011) ("This inquiry [of reasonable foreseeability] is no longer proper after the United States Supreme Court's decision in *Kentucky v. King*, 131 S. Ct. 1849 (2011)."). The court observed that the following cases, setting forth subjective inquiries were overruled by *King II*: *See, e.g.*, United States v. Gomez–Moreno, 479 F.3d 350, 356–57 (5th Cir. 2007); United States v. Maldonado, 472 F.3d 388, 396 (5th Cir. 2006); United States v. Vega, 221 F.3d 789, 797 (5th Cir. 2000); United States v. Richard, 994 F.2d 244, 248–49 (5th Cir. 1993); United States v. Munoz–Guerra, 788 F.2d 295, 298 (5th Cir. 1986).

136 United States v. Aguirre, 664 F.3d 606 (5th Cir. 2011).

137 *Id.* at 611 n. 13 (citing *King II*, 131 S. Ct. at 1858).

138 Harsh v. City of Franklin, No. C–1–07–874, 2011 U.S. Dist. LEXIS 102678, at *11 (S.D. Ohio Sept. 12, 2011)

139 *Id.* at *12 (citing *King II*, 131 S. Ct. at 1862).

140 United States v. Franklin, No. 5:11–CR–42–KKC, 2011 U.S. Dist. LEXIS 135759, at *18 (E.D. Ky. Aug. 31, 2011) (quoting Ewolski v. City of Brunswick, 287 F.3d 492, 504 (6th Cir. 2002)) ("[A] police–created exigent circumstance exists only where the police have engaged in "deliberate conduct . . . evincing an effort intentionally to evade the warrant requirement.").

141 In *United States v. Hendrix*, 664 F.3d 1334 (10th Cir. 2011), the Tenth Circuit recognized that it could no longer evaluate bad faith actions by the police because of *King II*.

142 State v. Brewster, 2011 Ark. 530, 530 (Ark. 2011) (citing *King II*, 131 S. Ct. at 1859).

follow the reasonably foreseeable test.[143] This makes clear that *King II* will not be blindly followed and accepted by courts where additional state constitutional safeguards set higher protections for individual privacy and search and seizure limitations.

In sum, this new test, left untried by the Supreme Court, has already been used in juxtaposed ways: the Ninth Circuit, represented by the United States District Court for the Eastern District of Louisiana, has viewed *King II* as an objectively reasonable standard but then applied a subjective standard.[144] The United States Court of Appeals for the Fourth Circuit has cited *King II* in an objective standard by saying "[t]he Fourth Amendment's prohibition on unreasonable seizures includes the right to be free of seizures effectuated by excessive force. . . . Whether an officer has used excessive force is analyzed under a standard of objective reasonableness."[145] The Fourth Circuit continued in *Purnell*[146] by saying that a subjective approach for determining the reasonableness of a police officer's actions has repeatedly been rejected and that they shall give no regard to a police officer's underlying intent or motivation.[147] Some courts are focusing on the "reasonableness" standard set forth in *King II* but there remains a question as to how objective objectivity really is and a split is already occurring even though *King II* is a recently minted decision.

B. The Palpable Effect of King II

To understand the effect of *King II*, consider United States v. Hall.[148] In *Hall*, the defendant argued that because the police covered the peephole when they knocked on his door, the police-created the exigency because the police made it likely that the defendant would approach the door armed. Under the reasonably foreseeable test, this argument was proper and evidence suppression was likely. However, as noted by the court in

143 *Id.* at 530 (citing State v. Brown, 156 S.W. 3d 722 (2004) (noting that the court is not bound by federal interpretation of the Fourth Amendment when the Arkansas Constitution also provides safeguards against search and seizure); *see also* Arkansas v. Sullivan, 532 U.S. 769 (2001) (holding that a state is free to impose greater restrictions on police activity than those imposed under federal constitutional restraints including United States Supreme Court decisions).

144 United States v. Neal, No. 11–028 Section: R(3), 2011 U.S. Dist. LEXIS 110610, at *9 (E.D. La. Sept. 28, 2011) (quoting *King II*, 131 S. Ct. 1849, 1856 (2011) ("The 'presumption may be overcome in some circumstances because the ultimate touchstone of the Fourth Amendment is reasonableness.'").

145 Henry v. Purnell, 652 F.3d 524, 531 (4th Cir. 2011) (citing Scott v. Harris, 550 U.S. 372, 381 (2007)) (citations omitted).

146 *Id.* at 526.

147 *Id.* at 531 (citing Graham v. Connor, 490 U.S. 336, 397 (1989)).

148 United States v. Hall, No. 11–60169–CR–Martinez–McAliley, 2011 U.S. Dist. LEXIS 133522 (S.D. Fla. Nov. 16, 2011).

Hall, *King II* forecloses this argument.[149] Because of *King II*, police have significantly more discretion and *Hall* illustrates where individuals truly lose out.

There is some thought that the circuits will need time to adjust to and incorporate the holding of *King II* into their case law.[150] This is especially important considering the impact of this decision on criminal defense and the right to adequate council.[151] There is also the issue of when police conduct might go too far and whether the exigent circumstances doctrine might apply if police threaten to enter a residence without permission.[152]

VIII. The Problem with King II: Proposal

A. King II *is an Unworkable Standard, Restricting Flexibility in Evidence Suppression Hearings*

King II is troublesome because it did not truly solve the conflict in law among the courts. It is too inflexible to be properly tailored to each individual case, and a wholly objective standard—while proper in many areas of the law—is not always appropriate to gauge whether a search is unreasonable. The Supreme Court's unbending standard as defined in *King II* sets forth an unworkable test to derive an unreasonable solution from an inquiry that seems to be inherently subjective.[153] To delve into the subjective intent of a police officer is not to reward criminal activity in a home but rather to

149 *Id.* at *9–10.

150 Reply Brief for Petitioner at 10, Alvis v. Espinosa, 132 S. Ct. 1089 (2012) (No. 11–84), 2011 U.S. S. Ct. Briefs LEXIS 2579 (U.S. 2011) (pointing out that there the ruling in *King II* may need to "percolate" among the circuits.).

151 *See* 14 Joseph A. Grasso, Jr. & Christine M. McEvoy, Suppression Matters Under Massachusetts Law § 14–1 (2011) (citing *King II* and explaining that Massachusetts cases predating *King II* applied a reasonable foreseeability test and bad-faith inquiries) ("What amounts to an exigency . . . and what conduct the police may permissibly engage in without being deemed to have manufactured the exigency is likely to be considerably more nuanced and awaits case development.").

152 *See* 22 Michael G. Millman et al., California Criminal Defense Practice § 22.03 (2011) (noting that the United States Supreme Court, in *King II*, expressly left open the question of "whether the exigent circumstances doctrine applies when the police threaten to enter without permission unless they are admitted into the resident").

153 *See* Welsh v. Wisconsin, 466 U.S. 740, 749–50 (1984) ("[T]he police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests. . . . Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries.") (internal citations omitted); Payton v. New York, 445 U.S. 573, 586 (1980) ("[It is] a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.").

protect individual privacy.[154] In fact, the basis of the exclusionary rule is to deter police misconduct—actions police officers take to intentionally avoid the warrant requirement.[155] Unfortunately, considering whether police officers deliberately created an exigent circumstance to bypass the warrant requirement is no longer valid after *King II*.[156]

B. Where King II*'s Limits Should Be*

In her dissent, Justice Ginsburg reminds us that unwarranted entries into a home bear heightened scrutiny, are unreasonable per se, and that the warrant requirement "ranks among the fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."[157] "The police bear a heavy burden . . . when attempting to demonstrate an urgent need that might justify warrantless searches."[158] Inherent in Ginsburg's observations—that police must prove a compelling interest—is the necessity to retain an approach that is not entirely objective. To not consider bad-faith action on the part of the police so long as it can be deemed "objectively reasonable" does not properly protect one of our most fundamental individual rights. If we do not inquire why the police officer decided to enter the home and how compelling the interest was in accordance with not only the facts of the case but also what the police officer specifically considered the exigent reason, then we have stopped our inquiry far too short—at a threshold which falls somewhere below the scrutiny that constitutional questions deserve. For "[i]n no quarter does the Fourth Amendment apply with greater force than in our homes, our most private space."[159]

C. Is the Test Still the Totality of the Circumstances and Is There Any Room for Subjectivity?

Irrespective of an officer's subjective intentions, because the Fourth Amendment states that people are free from unreasonable searches, the

154 *Compare* Amicus Brief Supporting Petitioners, *supra* note 104, at 5 (arguing that subjective tests "reward illegal action"), *with* Katz v. United States, 389 U.S. 347, 351 (1967) ("The Fourth Amendment protects people . . . ."), Stanford v. Texas, 379 U.S. 476, 481 (1965) (stating that the Fourth Amendment is designed to protect), *and* United States v. Vega, 221 F.3d 789, 798 (5th Cir. 2000) (holding that a privacy is subjective).

155 *See* Whren v. United States, 517 U.S. 806, 812 (1996). *See also* Donald L. Dorenberg, *The Right of the People: Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259, 282 (1983).

156 United States v. Aguirre, 664 F.3d 606 (5th Cir. 2011).

157 *King II*, 131 S. Ct. 1849, 1864 (2011) (Ginsburg, J., dissenting).

158 *Id.* (Ginsburg, J., dissenting) (citing *Welsh*, 446 U.S. at 749–50).

159 Georgia v. Randolph, 547 U.S. 103, 115 (2006); Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring).

"ultimate touchstone of the Fourth Amendment is 'reasonableness.'"[160] This standard is determined by "look[ing] at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing."[161] Any warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency.[162] This dilemma presupposes the idea, and the Supreme Court seems to assume, that it is possible to determine whether a genuine exigency existed without considering what the officers believed at the time of the entry. Deliberate police action to skirt the warrant requirement should not stand to be rewarded as is currently being done under *King II*.[163] This highlights the fact that a proper test cannot be purely objective insofar as it will invariably remove the ability of a defendant in a suppression hearing to argue that there was some type of maligned subjective intent on the part of the police officer. Having highlighted the shortcomings of this doctrine and various courts' hesitancy to follow it, it is important to consider where the case law seems to be going and how this conflict can be resolved.

The Sixth Circuit, relying on *King II*, observed that an objective test is the default type of legal test and that law enforcement is best governed by objective standards rather than delving into the subjective state of mind of the officer.[164] However, simply because there is a default standard does not necessarily mean it is the most appropriate in every circumstance.[165] While an "objective standard" is not new to the law,[166] it seems misplaced in the context of search and seizure. Measuring a search can contain both a subjective and objective component,[167] and by extension, the Fourth Amendment should protect privacy by questioning the intent of those performing the search.[168] Courts have been directed to determine "whether the officers' actions are 'objectively reasonable' in light of the facts

160 United States v. Starling, No. 3:11-cr-30, 2011 U.S. Dist. LEXIS 130119 (N.D.W. Va. Oct. 14, 2011) (quoting *King II*, 131 S. Ct. at 1856).

161 United States v. Arvizu, 534 U.S. 266, 273 (2002).

162 Brigham City v.Stuart, 547 U.S. 398, 406 (2006); Harsh v. City of Franklin, No. C-1-07-874, 2011 U.S. Dist. LEXIS 102678, at *12 (S.D. Ohio Sept. 12, 2011) (citing *King II*, 131 S. Ct. at 1862).

163 *King II*, 131 S. Ct. at 1864 (Ginsburg, J., dissenting).

164 Stricker v. Cambridge Twp., No. 10-14424, 2011 U.S. Dist. LEXIS 84246, at *35 n.5 (E.D. Mich. Aug. 1, 2011) (quoting *King II*, 131 S. Ct. at 1862) ("The reasons for looking to objective factors, rather than subjective intent, are clear. Legal tests on reasonableness are generally objective . . . .").

165 *See* Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931) ("There is no formula for determining reasonableness. Each case is to be decided on its own facts and circumstances.").

166 *See* Brown v. Kendall, 60 Mass. 292 (1850) (explaining the concept of the "reasonable person" in a torts case).

167 *See* United States v. Brown, 510 F.3d 57, 65 (1st Cir. 2001).

168 *See King I*, 302 S.W.3d 649, 652-57 (Ky. 2010).

and circumstances confronting them, without regard to their underlying intent or motivation."[169] In considering whether an officer used reasonable force, a court must focus on the moment that the force is employed.[170] But how can this be accomplished by a purely objective standard?[171] At least four of the circuits decided, prior to *King II*, that some type of subjective measure was necessary when evaluating police action in light of the Fourth Amendment.[172] Additionally, the Supreme Court's historical decisions on the existence of warrantless intrusions have always been very fact intensive.[173] This raises the issue of how far a court can delve into the facts of a case until they have gone too far so as to reveal the subjective intent of the police action.[174] Still, the Supreme Court has admittedly been unwilling to allow for a subjective measure in many situations of criminal law.[175]

169 Graham v. Connor, 490 U.S. 386, 397 (1989).

170 Elliott v. Leavitt, 99 F.3d 640, 643 (4th Cir. 1996).

171 *See* United States v. Santana, 427 U.S. 38, 45 (1976) (Marshall, J., dissenting) (stating that courts should consider whether "police conduct was justifiable or was solely an attempt to circumvent the warrant requirement").

172 *See* United States v. Mowatt, 513 F.3d 395 (4th Cir. 2008) (using a reasonably foreseeable, subjective approach); United States v. Coles, 437 F.3d 361, 367–70 (3d Cir. 2006) (supporting the idea that focusing on the reasonableness of police action is an important part of evaluating exigent circumstances); Ewolski v. City of Brunswick, 287 F.3d 492 (6th Cir. 2002) (holding that deliberate conduct on the part of the police to evade that warrant requirements negates a valid exigency); United States v. Rengifo, 858 F.2d 800 (1st Cir. 1988) (holding that police cannot deliberately avoid a warrant by relying on exigent circumstances).

173 Case law reveals that pre–*King II*, the United States Supreme Court considered detailed information about why a warrantless search was conducted. This seems to have an inherent element of subjectivity. *See, e.g.*, Michigan v. Fisher, 130 S. Ct. 546, 547 (2009) (holding in part that warrantless entry was justified to render emergency aid because police found property damage that they believed to be recent); Brigham City v.Stuart, 547 U.S. 398, 400–02 (2006) (holding that warrantless entry was justified to render emergency aid because police heard screaming and also saw a child hit an adult in the face after which the adult tried to subdue the child through a physical altercation that the officers believed to be excessive force); *Santana*, 427 U.S. at 40–41 (holding that warrantless entry was justified to prevent destruction of evidence where the police saw the defendant drop what appeared to them to be drugs onto the floor while going inside); Warden v. Hayden, 387 U.S. 294, 297 (1967) (holding that a warrantless entry was justified because a witness identified a robber at a specific residence and told the police); Schmerber v. California, 384 U.S. 757, 758–759 (1966) (holding that taking defendant's blood without a warrant was lawful because the police believed defendant to be drunk because they smelled liquor on his breath and his eyes were bloodshot and glassy in appearance and he had been involved in an automobile accident.).

174 *See* Terry v. Ohio, 392 U.S. 1, 25–26 (1968); *see also* Welsh v. Wisconsin, 466 U.S. 740, 751 (1984) (quoting McDonald v. United States, 335 U.S. 451, 459–460 (1948) (Jackson, J., concurring)) (holding that the "method of law enforcement" must be commensurate with the government's interests).

175 *See* Horton v. California, 496 U.S. 128, 138 (1990) (holding that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer"); Maryland v. Macon, 472 U.S. 463, 471 (1985) (stating that a controlled buy must be viewed objectively and not "retrospectively transformed into a warrantless seizure by virtue of the officer's subjective

D. A Subjectively Objective Standard

There are two express requirements of the Fourth Amendment: (1) all searches and seizures must be reasonable and (2) probable cause must be properly established in order to secure a warrant which sets out the authorized search with particularity.[176] Starting with *King II*, the standard for police-created exigencies is no longer subjective and can no longer contain any type of subjective, bad-intent, inquiry. However, this type of measure does not seem to be an entirely objective test. The Court held that a proper test would be what is reasonable in the circumstances, giving one pause to consider whether there is an inherent level of subjectivity involved in measuring contextual reasonableness.[177] Unfortunately, inquiry beyond this "reasonableness" dilemma seems usurped as the high court forbade lower courts from imposing additional requirements to measure exigent circumstances. In this case, the Court said that the Kentucky Supreme Court cannot ask whether officers "deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement."[178] This statement seems contrary to their holding that a proper test would be to consider what is reasonable in the circumstances.[179] The Kentucky Supreme Court held that police cannot rely on an exigency if it was reasonably foreseeable that their investigative tactics would create the exigent circumstances.[180] According to the United State Supreme Court, reasonable foreseeability is irrelevant, but there has been no explanation

intent"); Scott v. United States, 436 U.S. 128, 137 (1978) (holding that an objective standard is the proper standard for examining a valid warrant for a wiretap in light a pretext challenge); United States v. Robinson, 414 U.S. 218, 234 (1973) (holding that an objective standard is the proper standard for searches incident to an arrest); Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971) (holding that an officer's motive does not invalidate objectively justifiable behavior under the Fourth Amendment in relation to the plain view doctrine).

176 *See* Payton v. New York, 445 U.S. 573, 584 (1980).

177 For more on this point, consider Ohio v. Robinette, 519 U.S. 33, 39 (1996) ("[W]e have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry."); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931) ("There is no formula for determining reasonableness. Each case is to be decided on its own facts and circumstances.").

178 *King II*, 131 S. Ct. 1849, 1852 (2011).

179 *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1193 (1990) ("[T]he line between constitutional law and constitutional fact is often hazy, as illustrated by the "reasonable issue in Fourth Amendment jurisprudence."). Amar notes that the plain wording of the Fourth Amendment suggests that determining the reasonableness of a warrant should be determined by jury members and judicial warrants, because they take away the reasonableness issue from the jury, should be subject to stricter requirements when being issued. *Id.* at 1179. *Cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180–86 (1989) (advocating rules in part because it increases predictability in decision-making).

180 *King I*, 302 S.W.3d 649, 656 (Ky. 2010).

why an objective measure could not properly consider this fact. Further, not allowing this inquiry seems to be in conflict with measuring the reasonableness of actions within a given context.[181] The argument that a court can no longer question whether it was reasonable for an officer to create an exigent circumstance just to skirt the warrant requirement should fall flat on its face, but as the law currently exists, it is proper for courts to ignore this inquiry.

The Supreme Court said that the proper measure of exigent circumstances is an objective measure;[182] the standard is whether the facts known to the officers would support their belief.[183] In addition, courts have stated that in determining whether exigent circumstances exist, "[t]he core question is whether the facts, as they appeared at the moment of entry, would lead a reasonable, experienced officer to believe that there was an urgent need to render aid or take action."[184] This test "is an objective one that turns on the totality of the circumstances confronting law enforcement agents in the particular case."[185] In considering these highlighted factors (for example, what facts support the officer's belief for a warrantless entry, considering all of the circumstances in each particular case, etc.), some level of subjective inquiry is appropriate, and even post–*King II*, courts are employing various measures under the color of "objectivity."[186] It seems reasonable to have a standard that could be adapted to address the issue of bad faith on the part of the police officers in creating and then relying on an exigent circumstance to perform a warrantless search. It could be objective in nature ("reasonable police officer") in conjunction with a specific showing of the compelling interest that forced the police officer to conduct the warrantless entry. Therefore, it would be objective but more specifically tailored to ask why the police officer did what he did. This is a subjectively objective test—similar to the reasonably foreseeable test still used in some state courts—potentially extending the "particularized" language of the Fourth Circuit that has survived post–*King II*.[187]

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181 Consider the "particularity" concept that is being used conjunctively with the "objective" standard in measuring police–created exigent circumstances currently developing in the Fourth Circuit post–*King II*. *See* United States v. Starling, No. 3:11–cr–30, 2011 U.S. Dist. LEXIS 130119 (N.D.W. Va. Oct. 14, 2011).

182 Brigham City v. Stuart, 547 U.S. 398 (2006).

183 1–6 DONALD F. SAMUEL, ELEVENTH CIRCUIT CRIMINAL HANDBOOK § 131 (2011).

184 United States v. Klump, 536 F.3d 113, 117–18 (2d Cir. 2008).

185 Klump, 536 F.3d at 117 (quoting United States v. MacDonald, 916 F.2d 766, 769 (1990)).

186 *See* Cook v. City of Shreveport, No. 10–0809, 2011 U.S. Dist. LEXIS 92544, at *18 (W.D. La. Aug. 18, 2011) (stating that reasonableness for probable cause under the Fourth Amendment "exists when the facts and circumstances *within the arresting officer's personal knowledge* . . . are sufficient to occasion a person of reasonable prudence to believe that an offense has been committed") (emphasis added).

187 *See* United States v. Starling, No. 3:11–cr–30, 2011 U.S. Dist. LEXIS 130119, at *11

There are rights in the Fourth Amendment that guarantee individual privacy that are more deserving than a bright-line, objective standard.[188] When a fact pattern is unique, as a warrantless entry based on exigent circumstances certainly is, a subjective approach would best accomplish the need to evaluate the reasonableness of an entry.[189] In light of the idea that searches are per se unreasonable and that "whenever practical, [the police must] obtain advance judicial approval of searches and seizures through the warrant requirement,"[190] it would seem that an exception to such a fundamental right should be narrow and that courts would be very skeptical in allowing warrantless entries to stand. Undeniably, case law has weakened the explicit text of the Fourth Amendment and admittedly *King II* is one step further in that direction.[191] But it makes little sense to shorten the inquiry to objective reasonableness when details about an officer's motivation and intent in entering a house are easily accessible. There is an inherent problem in limiting what a court may do when considering the appropriateness of a search, especially considering that the Supreme Court has consistently held that it is important to consider the totality of the circumstances.[192] If the Fourth Amendment really does guarantee safety against unreasonable searches, then a police officer's intent to skirt the warrant requirement by creating his own exigent circumstance seems entirely relevant to a proper test and, in the event of "bad intent," should ultimately be considered an unjustified violation of the Fourth Amendment. My proposal suggests an objective test with some flexibility to appropriately gauge some level of subjective intent.

(N.D.W. Va. Oct. 14, 2011). Consider also that the judiciary, in other contexts has recognized the validity of tests that use both objective and subjective measures. *See* Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) (using a two prong test with an objective gauge and an independent subjective measure in a case concerning discrimination under Title VII), *and* Ocheltree v. Scollon Productions, Inc., 335 F.3d 325, 333 (4th Cir. 2003) (en banc) (same).

188 There are also inherent rights in the Fourth Amendment. *See* Griswold v. Connecticut, 381 U.S. 479, 483–85 (1965) (explaining that there is an inherent protection of right to privacy in the Fourth Amendment).

189 *See* Welsh v. Wisconsin, 466 U.S. 740, 749–50 (1984).

190 Terry v. Ohio, 392 U.S. 1, 20 (1968).

191 *See King II*, 131 S. Ct. 1849, 1864 (2011) (Ginsburg, J., dissenting).

192 Amar, *supra* note 178, at 1206 ("As the Fourth Amendment warrant clause . . . make[s] clear, professional judges acting without Citizen juries can sometimes be part of the problem, rather than the solution.")

Conclusion

The Fourth Amendment is an essential part of human dignity, privacy, and autonomy.[193] Homes are an integral and sacred facet of American life,[194] and "[t]he Fourth Amendment has drawn a firm line at the entrance to the house."[195] Searches and seizures in the home bear heightened scrutiny and police should bear the burden of demonstrating an urgent need so compelling that they had to violate a fundamental right.[196] Yet, from this seemingly unbreakable standard, under the precedent of *King II*, police simply need to knock, announce, and listen for movement inside at which point they can break down the door.[197] The only safeguard now protecting individual rights is a simple inquiry as to whether the police acted objectively reasonable. It is disheartening that such a low standard now exists to overcome such a fundamental, historical right.[198] *King II* is the new standard and unfortunately, until the split develops further and needs readdressing, *King II* reigns supreme.

193 Garcia, *supra* note 12, at 10 (noting that there are substantive human rights in the Fourth Amendment that the United States Supreme Court has recognized).

194 Frank v. Maryland, 359 U.S. 360, 376 (1959) (Douglas, J., dissenting) (stating that the Fourth Amendment not only protects privacy but is also a protector of "conscience and human dignity and freedom of expression as well").

195 Payton v. New York, 445 U.S. 573, 590 (1980).

196 *Id.* at 585–86.

197 *King II*, 131 S. Ct. 1849, 1864 (2011) (Ginsburg, J., dissenting).

198 *Payton*, 445 U.S at 585 (quoting United States v. U. S. District Court, 407 U.S. 297, 313 (1972)) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.").

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